Government Computer Sales, Inc. v. Dell Marketing, No. 05-35936

BERZON, Circuit Judge, dissenting:

I agree that if the Remarketer/Integrator Agreements ("R/I Agreements") in fact had no Schedule A listing the state contracts in effect at the time they were signed, then the agreements did not terminate with the state contracts in 2000 and defeat all of Government Computer Sales, Inc.'s causes of action. I do not see, however, how we can make that determination on a motion to dismiss.

The complaint alleges that in "the fall of 2000 . . . the written remarketer agreements terminated with the termination of the 1996 State Master Contract." The defendants attached the R/I Agreements, which on their face recognize that they "will terminate upon the termination of the Authorized Contract(s), if any, listed on Schedule A." This language, arguably, contemplates that there *will* be a Schedule A, which will list any extant contracts; if there are any listed, the R/I Agreements would terminate with the expiration of those contracts. One cannot tell by looking at the documents submitted by defendants whether there was or was not a Schedule A attached to them.

Given this feature of the R/I Agreements, nothing on the face of the attached R/I Agreements negates the termination allegations in the complaint or indicates that there is no set of facts that could be proven that is consistent *both* with the

termination allegations of the complaint and with the attached R/I Agreements. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The majority's disposition fills in the gap by stating that "GCS does not claim that a Schedule A was attached when it signed the R/I Agreements." But the complaint, construed in the light most favorable to the plaintiff, *see Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005), and read alongside the R/I Agreements, is entirely consistent with proof that there *is* a Schedule A containing a list of contracts with termination dates. The R/I Agreement contemplates that there could be. That is all we have.

Reliance on documents outside the record on a motion to dismiss is proper only if the complaint relies upon them, and then *only* as to matters the documents *unambiguously* establish. As nothing on the face of the R/I Agreements establishes that they did *not* terminate in 2000 because there were contracts listed in a Schedule A and expiring then, the motion to dismiss should not have been granted. Instead, the motion should have been converted to one for summary judgment once the R/I Agreements were submitted, with notice to the parties and, on appropriate motion and showing under Federal Rule of Civil Procedure 56(f), provision for necessary discovery. FED. R. CIV. P. 12(b).